Thuku v Republic (Criminal Appeal E002 of 2020)
[2023] KEHC 18058 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18058 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E002 OF 2020

GL NZIOKA, J

MAY 24, 2023

BETWEEN

JOB NGAU THUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence by Hon. H.O. Barasa Senior Principal Magistrate, delivered on, 11th November 2020, vide Criminal Case Sexual Offence No. 29 of 2018, at the Senior Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate Court on July 13, 2018, charged with the offence of defilement contrary to section 8 (1) and (2) of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act") in the 1st count and an alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act. He was also charged with the offence of sexual assault contrary to section 5 (1)(a) (ii) as read with (2) of the Act. The particulars of each charge are as per the charge sheet.

2. The appellant pleaded not guilty and the case proceeded to full hearing. The prosecution case is that, on July 10, 2018, "TW" (herein "the complainant") was going home from school when she met the appellant. He told her that he was going to take her where her mother was cutting grass. However, he took her to an incomplete house and defiled her. The complainant who was four (4) years old felt pain as the appellant was defiling her and screamed.

3. That (PW6) JWM who was cutting grass nearby by heard the complainant screaming and went to find out what was happening. She found the appellant in the act and on seeing her, he ran away. As the complainant was in school uniform (PW6) JWM called her school and she was advised to take her there. She took the complainant to the school.

4. That the school alerted the parents and the complainant's father (PW1) DMW went to the school and was informed of what had happened. He reported the matter to the police station and the complainant was given a P3 form and sent for medical examination. It was confirmed that she was sexually assaulted or defiled and the appellant was arrested and charged.

5. At the close of the prosecution case, the trial court ruled that the appellant had a case to answer and placed him on his defence. He testified that he was arrested on July 12, 2018, while at his place of work and attacked by a group of people including the complainant's father. That he was thoroughly beaten and badly injured. That he was rescued by his uncle and taken to hospital where he learnt that he was required by OCS Njabini Police station and when he got there he learnt of the charges herein.

6. He denied committing the offence and tore into the evidence of the prosecution evidence arguing that it was contradictory and that the prosecution had not proved the case to the required standard.

7. At the conclusion of the hearing the case, trial court delivered judgment on November 11, 2020, wherein the appellant was found guilty on the 1st count and sentenced to serve twenty-five (25) years. He was acquitted on count 2.

8. However, the appellant is aggrieved by the conviction and sentence and by a memorandum of appeal filed on December 16, 2020, he appeals against both on the grounds as here below reproduced that: -

    a. That, the learned appellate judge erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were NOT conclusively proved.

    b. That, the learned appellate judge erred in law and fact by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.

    c. That, the learned appellate judge erred in law and fact by sentencing the appellant yet failed to find consider his mitigating circumstances.

    d. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.

    e. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to a harsh and excessive sentence.

    f. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgment.

    g. That, further grounds shall be adduced at the hearing of this appeal.

    h. That, I wish to be present during the hearing and determination of this appeal

9. Subsequently the appellant filed amended grounds of appeal as follows: -

    a. That, the learned trial magistrate erred in law and facts by failing to appreciate that the appellant was not fit (sic) to stand trial due to his mental status.

    b. That, the learned trial magistrate erred in law and fact by failing to appreciate that the provisions ofarticle 50(2)(h) were not adhered to.

    c. That, the sentence meted upon the appellant was not only harsh but excessive in light of the facts and circumstances of the case.

10. However, the respondent opposed the appeal by filing submissions. The submissions filed were in response to the appeal and appellant's submissions. The appellant submitted vide submissions filed

on May 25, 2022 and March 10, 2023, that he was not fit to stand trial due to his mental status. That, despite the medical doctor stating that he was fit to stand trial, his conduct during the trial did not support the said finding.

11. That since he was incapacitated in representing himself due to his mental condition, the trial court should have informed him of his right to be assigned an advocate in accordance with article 50 (2) (g) and (h) of the *Constitution* of Kenya and section 43 (1) of the *Legal Aid Act*. That failure to do so, infringed on his constitutional right to a fair trial, which right cannot be limited in accordance with article 25 (c) of the *Constitution*.

12. Further, there were contradictions in the prosecution evidence. That the evidence adduced stated that the defilement occurred in the year 2018 while the complainant was born on February 12, 2018both of which were after the defilement was reported on July 12, 2017.

13. Further the sentence meted out is harsh and excessive as he is a first offender. Furthermore, he was in remand throughout his trial and that there is no evidence that the learned trial Magistrate took that period into account.

14. He urged the court to apply the provisions of; section 333 (2) of the *Criminal Procedure Code* which makes it mandatory for the court to consider the period spent in custody when meting out the sentence. He relied on the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009] eKLR.

15. However, the respondent filed submissions dated October 23, 2022 and argued that the appellant's contention he was mentally unfit to stand trial is an afterthought. That, he was referred to treatment at Mathari Hospital on January 19, 2019where he was treated and was found fit to stand trial on July 24, 2019.

16. Further he informed the trial court that he was okay and asked to be supplied with the prosecution documents. That, he fully participated in the trial as he cross-examined witnesses extensively, made various applications and offered a comprehensive defence.

17. Finally, that the sentence meted out on is lenient considering the age of the complainant, the circumstance of the offence and that the prescribed sentence is life imprisonment. That, the trial Magistrate considered the appellant's mitigation and the fact that he was in remand for over two years before sentencing him. The respondent urged the court to uphold both the conviction and the sentence.

18. Having considered the appeal, I first note that, as held by the Court of Appeal in the case of; *Okeno v Republic* (1972) EA 32, the role of the first appellant court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

19. The court thus observed: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v* R 1975) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v* R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's

findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

20. Be that as it were, the appellant was convicted of the offence of; defilement, created under section 8(1) of the Act, as follows: -

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

21. The ingredients of the offence are settled as considered in the case of; *Agaya Roberts v Uganda*, Criminal no 18 of 2002, where the Court of Appeal stated that, in order to constitute the offence of defilement the following must be proved: (i) sexual intercourse (ii) victims age below 18 years (iii) the accused is the culprit.

22. Similarly, in *Bassita Hussein v Uganda* Crimial Appeal No. 35 of 1995, the Supreme Court of Uganda laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

23. In considering the issue of age, it is settled law that, primary evidence in proof of the age of a person is; the birth certificate or a medical report and/or any other document prepared by a competent medical practitioner. The secondary evidence would include the evidence of a parent or guardian, or physical observation of the child and/or common sense (see *Hilary Nyongesa v Republic* (Uganda) HCCRA No 123 0f 2009).

24. In the instant matter the age was proved by the birth certificate No 00xxxxxx for Teresia Wanjiru issued on February 24, 2020 which showed that the complainant was born on February 11, 2014 and the offence is stated in the charge sheet to have taken place on 10th July 2018. Therefore, she was four (4) years and five (5) months, as such that element of age was properly proved.

25. The next issue relates to penetration. It is defined under section 2 of the *Sexual Offence Act* No. 3 of 2006 as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The courts have also settled when defilement occurs in the Court of Appeal in *Erick Onyango Ondeng' v Republic* [2014] eKLR where it quoted with approval the decision of the Ugandan Court of Appeal in *Twehangane Alfred v Uganda*, Crim. App No 139 of 2001, [2003] UGCA, 6 and held that:

> " ...We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In *Twehangane Alfred v Uganda* (*supra*) the Uganda Court of Appeal expressed the same view as follows: "In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

26. In instant matter the medical evidence was adduced by the Medical Officer, Dr Karanja Newton on behalf of Dr Rotich. The P3 form dated 11th July 2018, filled by Dr. Rotich indicated the nature of injuries laceration at perineal body. Hyperemic introitus; laceration 3 and 9 o'clock; hymen broken fresh tags at 6 o'clock; anus laceration at 3 o'clock; anal torn. Purulent non foul smelling PV discharge and Moderate epithelial cells; pus cells ++

27. Similarly, the PRC form dated July 11, 2017 was also filled by Dr. Rotich indicated injuries on the outer genitalia as laceration at perineal body. Vagina was inflamed with laceration as 3 and 9 o'clock.

Hymen was partially perforated. Anus had laceration at 9 o'clock and hyperemic with reduced anal torn, the doctor's comments are that; both anal orifice and introitus were penetrated.

28. In addition, the complainant stated that she was defiled through both the vagina and anus and PW6 JWM confirmed she found the perpetrator in the act. Therefore, adequate evidence of defilement

29. Finally, on the issue of who defiled the complainant, the evidence by the complainant was candid that it was the appellant who is her neighbour. PW6 JWM who is also the appellant's neighbour found him in the act. He has not advanced any reason why he would be implicated.

30. In fact, in his defence he does not address the events of the date when the offence was committed but instead turned his defence into submissions tearing into what he considered as inconsistencies and contradictions in the prosecution case

31. It is noteworthy that the alleged inconsistence and contradictions viewed in the light of the entire evidence adduced are of no significant effect on the entire evidence.

32. Finally, on the issue of his mental capacity the trial court's record clearly indicate that he was certified fit to stand trial before the matter commenced and did not display any behaviour that suggested otherwise. In fact, the entire record shows he fully participated in the trial cross examining witnesses at length and advanced a very length defence. That is inconsistent with a person suffering from the disease of the mind. I dismiss that ground of appeal.

33. The upshot of all this is that, I find that there was adequate evidence to sustain a conviction and I decline to quash it.

34. As regards sentence I find the sentence of twenty-five (25) years meted out where the law provides for a maximum of life imprisonment is lenient and taking into account the heinous act of the appellant defiling a four (4) year old through the vagina and anus, the appellant deserves a much more serious sentence.

35. However, the respondent did not seek for enhancement and I will not consider the same but so that justice is done and the appellant is kept away from the society I order that, the sentence of twenty-five years should run from the date thereof. That is the date of sentence in the trial court and the Prison Authority should ensure that remission is granted Only if it is in the interest of justice and society at large.

36. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF MAY, 2023

GRACE L. NZIOKA

JUDGE

In the presence of;

Appellant present in court virtually

Mr. Atika for the Respondent

Ms Ogutu- Court Assistant